No. 14,799

In the

United States Court of Appeals

For the Ninth Circuit

GEORGE PEOPLES, *Appellant,*

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, *Appellee.*

APPELLANT'S REPLY BRIEF

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DECISIONS

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PRELIMINARY ANALYSIS

Appellee's brief joins issue with appellant's brief on three of the specifications of error stated in that brief, those numbered I, II and III. Appellee's proposition "A" is directed to Specification of Error No. I, proposition "B" to No. II, and proposition "C" is apparently intended as an answer to Specification of Error No. III. Actually, this proposition depends upon propositions "A" and "B." For this reason no reply will be made to it separately.

Throughout the brief the assumption is made and constantly restated that the collective bargaining agreement under which appellant was employed expressly required that appellant use the procedure provided in

Article 58 (c) of the agreement before he could maintain this action for damages. In making this assumption appellee assumes one of the issues. While appellee's brief does on pages 15 and 16 address itself to this issue, the brief by and large is framed on the theory that this premise of their argument is conceded.

REPLY TO APPELLEE'S PROPOSITION "A"

Appellee asserts that the District Court did not err in holding appellant's suit was barred by reason of his failure to comply with Article 58 (c) of the collective bargaining agreement since the unchallenged facts show that appellant failed to comply with "essential conditions precedent to the assertion of the claim and the maintenance of the action." (Brief for Appellee, p. 5).

We will analyze this proposition in the order in which it is presented in appellee's brief, pp. 5-19.

1. Appellee first contends that in the absence of a contract limiting common law rights a railroad employer has the right to terminate an employee at will and this right is not changed by the NRLA. (Br. Appellee, p. 7).

2. It is then asserted that appellant's rights are measured by the terms of the collective bargaining agreement and appellant is bound by the agreement.

We agree in substance with both of the above statements. Appellant had an individual contract of employ-

ment with appellee which, in effect, embodied the terms of the collective bargaining agreement.

The District Court made no finding or conclusion on this point so the judgment in the lower court was not based on any holding that appellee had the right to discharge the appellant at will. Rather, it seems to have been assumed by the court that Article 57 (b-k) did limit the right of discharge but that no cause of action existed because of failure to comply with Article 58.

3. Appellee next argues that the law is well settled in this Circuit that under the circumstances of this case appellant has no subsisting cause of action. Appellee cites the case of *Barker v. Southern Pacific Company*, 214 F. (2d) 918 as a controlling decision which is allegedly unfavorable to appellant's position. Appellee also cites *Wallace v. Southern Pacific Company*, 106 F. Supp. 742 (U.S. D.C., N. D. Cal., 1951), *Buberl v. Southern Pacific Company*, 94 F. Supp. 11, and five unreported cases, two in the United States District Court for Oregon, one in the Northern District of California, one in the District of Nevada and one in a state trial court in Utah.

The law of other states in the Circuit is not controlling. The law of Oregon governs the construction of the contract of employment. (Br. Appellant, p. 19). Decisions in other jurisdictions, of course, may be relevant in attempting to arrive at a determination of what the Oregon law is or should be.

We have discussed the *Barker* case in our original brief. It is discussed by appellee with quite different results on pages 7-8 of Brief for Appellee. Opposing counsel fail to note that in the *Barker* case the terms of the contract were quite different. There Rule 25 (2) provided what we may call the "dismissal procedure" and permitted the employer to discharge the employee without investigation. The employee might then make a written request for a hearing. Rule 25 (i) contained provisions for the "further handling" of a grievance. For convenience we call this the "grievance procedure." The use of the "grievance procedure" was not directly held to be a condition to proceedings in court. The court, after describing Rule 25 (i), stated that Rule 25 might embrace both administrative procedure and possible recourse to the courts, but that the request for hearing was intended to be a condition to both procedures.

The case of *Wallace v. Southern Pacific Company*, 106 F. Supp. 642, also arose in California. The decision in the case does not disclose what the plaintiff's contentions were or whether he urged upon the court the contract interpretation advanced by appellant here.

The comments made above on the *Wallace* case also apply to another case arising under California law which is cited by appellee, *Buberl v. Southern Pacific Co.*, 94 F. Supp. 11. Further in the *Buberl* case the complaint was

based on the alleged breach by the employer of Article 57 (f) of the collective bargaining agreement, namely a provision for *reinstatement* with back pay where the discharge is found to be unjust, and not on the failure to accord plaintiff a proper investigation.

4. Appellee next cites a number of cases which, it is said, held that causes of action were barred because of the failure of plaintiff to comply with the expressed requirements of collective bargaining agreements. (Br. Appellee, p. 18).

Of these cases two are unreported cases in the United States District Court for the Northern District of California. Of the remainder, only two appear to be directly relevant to the issues of this case.

Atlantic Coast Line R. R. Co. v. Pope, 119 F. (2d) 39 (CCA-4; 1941) was an action by a discharged employee to enforce an award of the NRAB providing for his reinstatement by the defendant.

The case has no direct bearing on the present case. It was concerned with a dispute under the RLA, not with a claim for damages for breach of an individual contract of employment. The time limitation in the *Pope* case was made a condition of processing a claim before the adjustment board and directed to reinstatement only.

Davis v. Union Pacific RR Co., 21 CCH Labor Cases, Par. 66,834 (U.S. D.C., Neb.: 1952) is similar to the case of *Barker v. Southern Pacific Company*, 214 F. (2d) 918 discussed on pages 3-4 herein. The same distinction exists between the *Davis* case and the instant case as between the *Barker* case and the instant case.

United Railroad Workers v. A.T. & S.F. Co., 89 F. Supp. 666 (U.S. D.C., Ill. N.D.; 195) was an action by an employee and a union against a railroad. Defendant's motion to dismiss as to the union was granted. The claim of the individual was not affected and his case was left for further proceedings. This decision gives no support to appellee's position.

The case of *Youmans v. Charleston and W. C. Ry. Co.*, 175 S. Ca. 99, 178 S. E. 671 (1935) held that the availability of a remedy for the settlement and adjustment of grievances through a board under the NLRA did not prevent an employee who claimed he had not been given a fair and impartial hearing under an agreement, from bringing an action for damages without having exhausted such administrative procedures.

McGlohn v. Gulf and S.I.R.R., 179 Miss. 396, 174 So. 250 (1937) was an action by an employee for damages for a summary dismissal without formal investigation. It was held that the declaration was sufficient even though there was no allegation in the declaration that

plaintiff had pursued an appeal procedure provided for in the collective bargaining agreement.

This case supports appellant. Other Mississippi cases, the latest of which is *Dufour v. Continental Southern Lines, Inc.*, 68 So. (2d) 489 (1953) make it clear that under Mississippi law the grievance procedure need not be exhausted before a suit for damages for wrongful discharge may be maintained.

The remaining two cases cited on page 13 of appellee's brief, *Crow v. Southern Ry. Co.*, 66 Ga. 608, 18 S. E. (2d) 690 (1942) and *Hornsby v. Southern Ry. Co.*, 70 Ga. App. 467, 28 S. E. (2d) 542 (1944) do support appellee's proposition. We believe, however, that they have been effectively overruled by the decision of the Supreme Court of Georgia in *Central Georgia Railway Co. v. Culpepper*, 209 Ga. 844, 76 S. E. (2d) 482 (1953).

5. Appellee next argues that Oregon law requires that a party seeking to recover on a contract show that he has complied with conditions required of him and that contractual terms such as in Article 58 (c) have been upheld restricting time and manner in which rights under the contract can be enforced.

We do not agree that contractual terms such as those stated in Article 58 (c) have in Oregon been held to restrict the right of a discharged employee to maintain an action for damages.

Appellee relies on two Oregon cases in support of the above point. One of these, *Beck v. General Insurance Company*, 29 Or. 403, 42 P. 990 (1895) was discussed in our original brief at page 20. The other, *Ausplund v. Aetna Indemnity Company*, 47 Or. 10, 81 P. 577, 82 P. 12 (1905) is a similar case.

In these cases the limitations were made a condition to civil proceedings. In the instant case Article 58 (c) is not so stated or related to a civil action. Also, the provisions of Article 58 do not simply amount to a time limitation. They comprise, in effect, a special procedure available to an aggrieved employee for the correction of a grievance. In the case of a discharged employee the correction contemplated would be restoration to employment and the claim one for reinstatement.

There is no reported decision of any Oregon court holding that a discharged employee must exhaust a grievance procedure in a collective bargaining agreement before he can maintain an action for damages for breach of his contract of employment. The two unreported cases from the United States District Court for Oregon, cited by appellee, were based on the *Beck* case.

6. On pages 15 and 16 of the Brief for Appellee counsel argue as a matter of construction that the provisions of Article 58 are conditions precedent to a civil action for damages. They state that there is no merit to

appellant's argument that these provisions apply solely to recourse to the NRAB. They then summarize portions of Articles 57 and 58 and conclude that they are unequivocal conditions precedent to maintenance of a civil action.

To repeatedly assume and assert that these provisions are such conditions doesn't make them so.

On page 15, counsel for appellee have emphasized certain language out of Article 58, principally the words "disciplinary cases" and "claim." They would give these words a broad meaning to include a claim for damages and a case for damages in a civil court. This they do without regard to the context in which the words occur and without consideration of the meaning given these words in the field of collective bargaining.

Counsel also assume, in their argument on page 15, that Articles 57 and 58 are completely integrated and mutually dependent clauses. This is patently incorrect. It appears from the face of the agreement that these articles, while related, are independent articles.

7. At pages 16-18 appellee claims that the conditions of Article 58 are substantially the same as those in *T.W.A. v. Koppal*, 345 U. S. 653 (1953); 199 F. (2d) 122 (CA-8; 1952), and that the trial court's holding in the present case is in accord with the *Koppal* case.

The opinions of the United States Supreme Court and of the Court of Appeals in this case do not contain a

verbatim recital of the relevant provisions of the collective bargaining agreement. It is not possible from either or both opinions to get a complete description of the provisions establishing the grievance procedure or to evaluate the relationship between the "dismissal procedure" and the "grievance procedure." It does appear that the provision for appeal to the chief operating officer of the company and to the System Adjustment Board were permissive and not mandatory in their expression. The Supreme Court did not have occasion to consider the significance of the use of permissive language or to even consider the construction to be given the provisions of the agreement. The court simply applied what it concieved to be the law of Missouri. This conception was based on a decision of the Missouri Court of Appeals in *Reed v. St. Louis Southwestern R. Co.*, 95 S.W. (2d) 887 (Mo. App. 1936), from which the Supreme Court quoted in footnote 3 of its opinion.

We submit the holding of the *Reed* case is erroneous as a matter of contract law and would not be followed by Oregon courts. It is significant that there is no decision of the highest appellate court of Missouri which adopts this view. All of the reported decisions of the state courts of Missouri are those of lower appellate courts.

None of the Missouri decisions note the distinction between the reinstatement remedy and the damage

remedy. None consider the significance of the use of permissive language or give consideration to the intention of the parties to the agreement. They adopt the rule that where a procedure for redress is provided under the contract that procedure, as a matter of law, must be followed before resort to a civil court.

8. Likewise, on pages 16-18 of its brief, Appellee urges that the case of *Barker v. Southern Pacific Company*, 214 D. (2d) 919 (CA-9; 1953) is authority for appellee's interpretation of the collective bargaining agreement. For the reasons advanced in pages 22-23 of our original brief and on page 4 herein, we believe the *Barker* case must be distinguished.

We also believe it significant that opposing counsel have not cited any decision of the Supreme Court of California or of the California Court of Appeals in this type of action. We have found no decision of a California appellate court in this precise situation.

Examination of the cases cited by appellee under this point fails to disclose that one case of those cited is a decision of the highest appellate court of any state.

9. Appellee, on page 19, asserts that the cases cited by appellant on pages 32 and 33 of his brief are not applicable. It is claimed that the cases of *Dufour v. Continental Southern Lines, Inc.*, 219 Miss. 296, 68 So. (2d) 489 (1953) and *Thompson v. Moore*, 233 F. (2d)

91 (C.A.-5; 1955) do not reach the question of expressed contractual conditions.

The contractual provisions in the *Dufour* case were different than those in the present case, but were, if anything, more favorable to appellee's contention that the contract procedure must be pursued. Section 3 of Article X of the agreement contained provision for a dismissal procedure similar to that in the *Barker* case. Failure to request a hearing was stated to constitute a forfeiture of "any" claim. The section further provided for "appeals." The appeal procedure is not described in the opinion of the court but it obviously was directly related in the agreement to the "dismissal procedure."

In the case of *Thompson v. Moore*, it is true that there were no expressed contractual provisions for a grievance procedure. The defendant relied upon an alleged agreement built up by custom. The Court of Appeals, however, recognized the Texas Rule to be that exhaustion of administrative remedies under the contract of employment was not required under Texas law. The lower court, on the authority of a decision of the Texas Supreme Court, had overruled the defendant's motion to dismiss based on the ground of failure to exhaust contract remedies. This ruling was held not to be reversible error.

Certiori was denied in the *Thompson* case by the United States Supreme Court on October 24, 1955.

REPLY TO APPELLEE'S PROPOSITION "B"

This proposition consists of two general contentions:

1. That there are no facts which would excuse appellant from compliance with the provision of Article 58, and

2. That the appellant waived the right to contend he was excused from such compliance by filing a grievance as provided in Article 58.

1. Appellant has not referred to any facts which would excuse him from compliance with the provisions of Article 58.

a. On pages 20 to 22 appellee undertakes to state various facts that were stipulated to or contended for by the appellant in the Pre-Trial Order. We have no particular quarrel with any of this material except the assertions on page 21 that Mr. M. S. Felter, appellant's union representative, recognized the applicability of the steps provided in Article 58 by writing a letter dated January 10, 1953, to the superintendent and that the letter of January 10th was accepted by appellee as a presentation of appellant's grievance as required by Article 58 (c). There are no facts, either stipulated or contended, from which these conclusions can be fairly drawn. The only evidence in the record relating to these two assertions consists of Felter's letter of January

10th and the superintendent's reply of January 12, 1953. (R. 19-20). In his letter Felter requested favorable consideration for the reinstatement of Peoples and gave a short summary of the circumstances under which Peoples was absent from work. There was no reference made to Article 58 or any portion of the collective bargaining agreement.

It is hardly reasonable to conclude from the language of the letter itself that the author intended anything more than an informal effort to secure reconsideration of appellee's dismissal of Peoples.

It is to be noted that M. S. Felter was a representative, not of the BRT which had the collective bargaining agreement, but of the United Railroad Operating Crafts, a different labor organization.

In his letter, the superintendent, Mr. Hopkins, made no reference to Article 58 nor indicated that he considered that Peoples had submitted a grievance or claim under Article 58.

We believe, therefore, that both of these assertions are unsupported by the facts properly before the Court.

b. In the same connection appellee claims in its brief on page 22 that it is significant that Mr. Felter's letter of January 10th does not assert or refer to any alleged defect on the part of appellee in the matter of notice or hearing in the handling of the appellant's

dismissal. We fail to see any significance in this omission. Mr. Felter stated in his letter certain alleged facts with which the appellee presumably was not familiar. He probably considered it unnecessary to refer to facts with which the appellee was fully familiar, namely, that appellant had not received notice of the hearing or attended or been represented at the hearing.

c. Appellee argues on pages 20 and 21 at various points that it is unreasonable to contend that the means provided in Article 58 for reviewing and rectifying erroneous action is not applicable to this case; that appellant cannot insist upon the benefits of the agreement and at the same time disavow his obligations; and that the appellant cannot, a year and a half after his dismissal, make the contention that compliance with the agreement was excused.

No reasons are given in support of these assertions except in the paragraph on page 20 of brief in which appellee states what it considers to be the purposes of Article 58, namely: (1) That it gives a high company officer a chance to review action and correct errors and (2) that it protects the parties to the agreement from the assertion of stale and vexatious claims.

On pages 43 and 44 of our original brief we pointed out that in this case the first purpose could not have been accomplished by use of the grievance procedure.

The second purpose stated by the appellee for Article 58, that of foreclosing the presentation of stale and vexatious claims would appear to have particular application to reinstatement claims, involving as they do the continued relations of the employer, union and employees represented by the union. No considerations are pointed out by appellee which would make this purpose relevant to a suit for damages by an employee who accepts his termination as permanent. On the contrary, it would appear that the exhaustion of the procedure would only prolong the institution of a civil action and the final adjudication and settlement of the claim.

On pages 22 and 23 of its brief appellee states that in most of the cases which it has cited the claim of a wrongful dismissal was coupled with a claim that the carrier had failed to accord a proper hearing or investigation under the agreement. They referred to two unreported cases and to *Wallace v. Southern Pac. Co.*, (U.S. D.C., N.D. Cal. S. D. 1951), 106 F. Supp. 742 and *T.W.A. v. Koppal*, 345 U. S. 653 (1953), 199 F. (2d) 117 (1952).

In the *Wallace* case, so far as the reported decision discloses, no contention was made by the plaintiff that compliance with Article 58 was excused and the brief opinion of the court does not consider this idea. Moreover, there was a conclusion of law made by the court that defendant had complied with each and every provision of the agreement and particularly with Article 57.

In the *Koppal* case it appears from the opinion of the Court of Appeals that plaintiff had claimed that he was not given a fair hearing and the court stated that the record contained evidence from which it could have been found that this was so. In holding that the plaintiff was not required to exhaust his remedies under the contract the decision of the Court of Appeals was based not on any finding that compliance with the grievance procedure was excused but on the conclusion that the federal law governed and that under federal law exhaustion of such remedies was not required. It was for this reason that the case was reversed by the United States Supreme Court. In the decision by the United States Supreme Court no consideration was given to the question of whether under Missouri law the plaintiff was excused from pursuing the grievance procedure of the contract. The decision does not disclose that any such contention was made by the plaintiff in the case before the Supreme Court.

d. On page 24 of its brief, appellee disputes and criticizes appellant's citation of the study made of awards of the National Railroad Adjustment Board, First Division, by the Institute of Industrial Relations of the University of California. Appellee states that the awards mentioned in the quotation from this study on page 40 of appellant's brief are old cases. Since there is no public

library in the State of Oregon which receives the awards of the NRAB, appellant used what appeared to be the best available recent study of the decisions of the Board. We believe the study is authoritative.

Appellee, on page 24, cites a decision of a special adjustment board upholding an investigation conducted in the absence of the claimant. It appears from appellee's description of this case that a registered letter had been sent to claimant at his last known address, which was returned unclaimed. Presumably the board found this to have been sufficient compliance with some provision of the contract requiring such notice. Under the facts of that case the letter may have been sufficient compliance. In the present case, however, it appears that the notice was never sent to appellant's last known address or through the usual channels employed by the appellee in giving notice to its employees.

Appellee also disputes appellant's citation of the case of *New Orleans Public Belt R. Comm. v. Ward*, 195 F. (2d) 829 (CA-5; 1952). We submit that analysis of this case will show that it does support appellant's position.

2. Appellant has waived his right to contend that he was excused from compliance with Article 58.

It is asserted by appellee on page 21 that appellant cannot avoid the fact that he waived such excuse by

virtue of the letter of M. S. Felter to the superintendent dated January 10, 1953.

No reasons are given or cases cited in support of this proposition. We have already noted above that the record does not support this conclusion, which appellee's counsel have urged, that Felter's letter was intended as the submission of a grievance or that it was accepted as such, supra, pages 13-14. We are unable to understand how such a submission, even if it had been made, would have worked a waiver of any kind. There is nothing to indicate that the appellee changed its position as a result of Felter's letter or that it was prejudiced in any way.

In making this contention counsel are apparently trying to say that by writing this letter the appellant made an election to proceed through the grievance procedure of the NRAB rather than a proceeding in a civil action. It is true that the two remedies are mutually exclusive and it has been held that where an employee has successfully sought reinstatement through the NRAB he is barred from bringing an independent action for damages. However, the filing of a grievance preliminary to the NRAB procedure does not constitute an election.

Keel v. Ill. Terminal R.R. Co., 346 Ill. App. 169, 104 N. E. (2d) 659 (Ill.; 1952).

The appellee in its statement of contentions in the Pre-Trial Order did not advance this proposition as one of its contentions in the case.

Respectfully submitted,

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